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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DARREN ALEXES HILTON, Defendant and Appellant.	D052723 (Super. Ct. No. SCS200352)

APPEAL from a judgment of the Superior Court of San Diego County, Alvin E. Green, Jr., Judge. Affirmed.

In a 12-count third amended information (information), the San Diego County District Attorney charged Darren Alexes Hilton with forcible rape (count 1: Pen. Code,[1] § 261, subd. (a)(2)); pandering by encouraging (counts 2, 4 & 9: § 266i, subd. (a)(2)); forcible oral copulation (counts 3 & 10: § 288a, subd. (c)(2)); lewd acts upon a child 14 or 15 years of age (counts 5, 6, 7, & 8: § 288, subd. (c)(1)); oral copulation of a person

1 All further statutory references are to the Penal Code.

under 18 years of age (count 11: § 288a, subd. (b)(1)); and employment of a minor to perform prohibited acts (count 12: § 311.4, subd. (b)).

For purposes of sentencing, the information alleged that (1) Hilton committed forcible rape as charged in count 1 against more than one victim (§ 667.61, subds. (b), (c) & (e)); (2) the victim of the pandering charged in count 2 was under 16 years of age (§ 266i, subd. (b)); (3) Hilton committed the forcible oral copulations charged in counts 3 and 10 against more than one victim and kidnapped the victims of those offenses (667.61, subds. (b), (c) & (e)); (4) he committed the offenses charged in counts 9, 10 and 11 while released from custody on bail or on his own recognizance (§ 12022.1, subd. (b)); and (5) he had one prior serious felony (§ 667, subd. (a)(1)) and one prior strike conviction (§§ 667, subds. (b)-(i), 1170.12).

The court granted Hilton's section 995 motion as to count 12 and dismissed that count. Hilton admitted pretrial the "while released on bail" allegations (§ 12022.1, subd. (b)) in counts 9, 10 and 11. Following the presentation of evidence at trial, the court granted the prosecutor's motion to dismiss the count 2 allegation that the victim (Marcella S.) was under the age of 16 years (§ 266i, subd. (b)) based on insufficiency of the evidence.

A jury consisting of nine women and three men found Hilton guilty as charged in the remaining counts (counts 1-11) and found true the remaining allegations on those counts. At the sentencing hearing, the court denied Hilton's new trial motion, in which he claimed the court had erred during voir dire in denying his *Wheeler/Batson* motion for dismissal, and in which he challenged what he asserted was the prosecutor's improper use

of peremptory challenges to excuse four male prospective jurors in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). The court then sentenced Hilton to an indeterminate prison term of 65 years to life, consisting of 15 years to life for count 1 plus two consecutive terms of 25 years to life each for counts 3 and 10. The court imposed but stayed sentence (under § 654) as to count 11 and sentenced Hilton to an additional determinate term of 12 years four months, consisting of a consecutive four-year middle term on count 2; a consecutive term of 16 months (one-third of the four-year middle term) each on counts 4 and 9; a consecutive term of eight months (one-third of the two-year middle term) each on counts 5, 6, 7 and 8; a consecutive one-year term (one-third of the three-year middle term) for an unrelated robbery conviction (in case No. SCS198921); and a consecutive two-year term for the true findings on the "while released on bail" allegations (§ 12022.1, subd. (b)) in counts 9, 10 and 11. The court thus sentenced Hilton to an aggregate prison term of 77 years four months to life.

Hilton appeals, contending (1) the court erred in denying his *Wheeler/Batson* motions in which he challenged the prosecutor's use of peremptory challenges to excuse prospective male jurors 1, 14, 23 and 36; and (2) the prosecutor committed misconduct and violated Hilton's federal constitutional right to a fair trial by asserting during closing arguments that "the Lord worked for" one of the alleged victims, Marcella S. We conclude the court did not err in denying Hill's *Wheeler/Batson* motions, and the prosecutor did not commit reversible misconduct. Accordingly, we affirm the judgment.

FACTUAL BACKGROUND

A. *The People's Case*

1. *Count 1: Lydia F.*

Sometime in 2004, then-14-year-old Lydia F., who was born in May 1990, was with some friends at her house in National City when she spoke to Hilton on a telephone chat line. Lydia and Hilton exchanged telephone numbers. After speaking on the phone regularly for a couple of months, they met when Hilton picked her up at her high school. Thereafter, Hilton, who was born in August 1979 and was then about 25 years of age, visited Lydia at her home almost every Sunday.

About two months after they met, Hilton picked up Lydia in his light-blue Cadillac and drove her to his house in Chula Vista. Hilton asked Lydia to go upstairs to his bedroom with him so he could look for something. She sat down and closed her eyes after watching television. When she opened her eyes, Lydia was shocked to see Hilton's penis near her face. He told her to "go down on [him]" and perform oral sex on him. When she refused, Hilton became aggressive. Lydia told Hilton, "If you put it in my mouth I'm going to bite it." Hilton forced his penis in Lydia's mouth, and Lydia bit his penis. Hilton pulled his penis from Lydia's mouth, screaming, "Why did you do that?" She told him, "I told you I didn't want to." Frightened, angry and upset, Lydia asked him to take her home and he did.

Hilton later called Lydia and apologized. About a week later, she forgave him and began seeing him again on Sundays.

A couple of months later, Hilton picked up Lydia at her home, drove her to his house, and took her upstairs to his bedroom. Acting aggressively with a strange look in his eyes, Hilton tried to touch her and asked whether she wanted to have sex with him. Lydia said, "No." Hilton became angry, grabbed Lydia and pulled her up by the hips and, dangling her off the bed yanked off her pants. He ripped her pants so hard he left scratches on her legs. Frightened, Lydia started crying. Hilton pulled her underpants to the side, placed one of his arms across her chest to hold her down, and raped her. Crying, Lydia put her clothes back on, and Hilton took her home. Sometime thereafter, Hilton telephoned her, told her she wanted to do it, and asked her not to say anything about what had happened.

2. *Count 2 and 3: Marcella S.*

In 2004 Marcella S., who was born in February 1988 and was living in Lemon Grove near the trolley station, attended school with a female named Ch'keil Nailon. In July 2004 Marcella underwent oral surgery and had six stitches on her inner lower lip and another six on the roof of her mouth. She was in pain.

In the afternoon on July 16 of that year, Marcella and Nailon went to the trolley station to hang out, meet Hilton, and drink alcohol. Hilton arrived in his blue Cadillac, and Nailon introduced him to Marcella as "D." Marcella and Nailon got into the car and Hilton drove them to his house. They all went upstairs to Hilton's bedroom, drank some rum, and smoked a marijuana cigar that Nailon had brought.

When Nailon stepped out of the bedroom, Hilton touched Marcella's leg and told her she was pretty. Marcella told Hilton she had a boyfriend and she did not want him to

touch her, but Hilton ignored her. Marcella went into the bathroom, and when she returned Nailon was orally copulating Hilton. Hilton looked at Marcella and said, "You're next." Marcella became frightened, left the house, and wrote down the license plate number of Hilton's car.

About 10 minutes later, Hilton and Nailon came outside, Marcella asked them to take her home, and Hilton said he would. They all got in the car, but instead of driving Marcella home, he drove them to a nearby park and stopped the car. Nailon called Marcella a liar and told her to get out of the car so she could "beat [her] ass." Hilton and Nailon both told Marcella they wanted her to make money for them through prostitution. Frightened they would beat her up, Marcella agreed.

As Marcella was crying, Hilton drove them to an apartment complex in National City and told Marcella he was going to park next to a bus stop and watch her from a distance. He handed her a sandwich bag filled with condoms and told her to be careful about whom she approached. Hilton told her to charge $50 for "blow jobs" and $100 for intercourse, and then give him all of the money upon her return.

Hilton then got into the back seat of the car, unzipped his pants, and forced his penis into Marcella's mouth for about a minute. Marcella cried, tried to push him away, and felt like she was going to vomit. Hilton told her to stop crying, and Nailon, who was in the front seat, was laughing. When Hilton removed his penis from Marcella's mouth, he said, "Now you won't feel so bad about cheating on your boyfriend." Marcella cried more. Hilton told her to clean up her face and put on more makeup, which she did.

Hilton drove around the corner and parked the car again. In an effort to get away, Marcella falsely told Hilton she was on her period and needed to use the restroom. She entered a nearby Mexican restaurant and went into the restroom. From there she called her mother on her cellular phone, and told her that Hilton and Nailon had taken her, that Hilton stuck his penis in her mouth, they were trying to "pimp [her] out." While Marcella was on the phone, Nailon knocked on the bathroom door and said they were leaving. Marcella told her mother where she was and that they were banging on the door and insisting she leave with them. Marcella's mother told her to go to the sidewalk and draw attention to herself. Marcella hid her cell phone in the bathroom, and her mother called 911 and drove to look for Marcella.

When Marcella walked out of the taco shop with Nailon, Marcella saw a man later identified as Aaron Carrillo. Marcella walked up to Carrillo and asked him whether he was looking for a date. Surprised because Marcella was crying and shaking and seemed distraught, Carrillo asked her whether she needed some help. Marcella said she did. Marcella pointed to Hilton and Nailon and told Carrillo she needed to get away from them. Carrillo took Marcella to his car. As they were driving away, Nailon walked up to Carrillo's car and yelled, "Hey, where are you going with her?" During the drive, Carrillo allowed Marcella to use his cell phone. Marcella called her mother and arranged a location where they could meet. Carrillo waited with Marcella at that location until her mother arrived. Marcella later gave to a Chula Vista Police Department officer the piece of paper on which she had written down the license plate number of Hilton's car.

3. *Counts 4-8: Jasmine H.*

Jasmine H. was born in December 1990. When she was in the ninth grade, Hilton introduced himself to Jasmine and said his name was "D." Hilton asked her whether she wanted to be a prostitute, and Jasmine responded she would think about it.

About a year later, sometime in 2004 when Jasmine was 14 years of age, Nailon telephoned Jasmine and asked her to meet with her and Hilton at a McDonald's across the street from the Serra High School near Tierrasanta where Jasmine attended school. When Jasmine met Hilton and Nailon there, Hilton and Nailon asked her to "go on the blade," which meant to be a prostitute. Jasmine agreed, and Hilton and Nailon taught her how to be a prostitute.

Jasmine acted as a prostitute for Hilton, having sex with men who paid her between $30 and $100. She would give all of the money to Hilton, who in turn bought her jewelry and clothing. On every occasion, Hilton picked up Jasmine in his blue Cadillac and drove her either to El Cajon Boulevard or National City Boulevard. Sometimes Nailon was with Hilton, who referred to himself as "Daddy."

During this period of time, Jasmine became involved in a relationship with Hilton. Hilton had sexual intercourse with her on several occasions, and she performed oral sex on him. After the first time she had sexual intercourse with Hilton, Jasmine told him she was 14 years old.

Sometime in 2005, Jasmine ran away from home and went with Hilton to Los Angeles, where she spent a week prostituting herself and giving the proceeds to Hilton in return for jewelry and a belt.

4. *Counts 9, 10 and 11: Victoria A.*

In January 2006 Victoria A., who was born in April 1989 and was 16 years of age, was living with her mother in Chula Vista. Victoria went to school with Nailon and Nailon's younger sister Janae.

On January 12, 2006, Victoria and another friend, Kendra, were visiting Janae. Nailon and Hilton showed up later. Nailon referred to Hilton as "Daddy."

Victoria said she was going to call her mother for a ride, but Janae suggested that Hilton drive her home. Victoria, Nailon and Kendra got into Hilton's light blue car. While Hilton drove, Nailon and Kendra told Victoria she was going to be a prostitute. Victoria told them she did not want to do it. Nailon told her she had to do it or "Daddy" would be angry. Frightened, Victoria agreed because she was afraid she would get hurt if she refused.

Hilton drove Victoria to National City and stopped by a hotel. Nailon and Kendra told Victoria how much to charge for various sex acts, and Hilton gave her a condom. The three young women got out of the car, and a man solicited Victoria for a sex act. Victoria refused and eventually told Hilton and Nailon that she wanted to go home.

After they all returned to the car, Hilton dropped Kendra off at a bus stop and then drove Victoria back to the hotel and told her, "No bitches ride in my car for free." Victoria became frightened when he said that. Hilton stopped the car and got into the back seat, unzipped his pants, and forced Victoria to orally copulate him. Frightened, Victoria tried to get up and told Hilton to stop, but he kept forcing her down. Nailon also held her hand on the back of Victoria's head and pushed it down on Hilton's penis. Hilton

told Victoria he was going to ejaculate or she would not get a ride home. Hilton and Nailon removed all of Victoria's clothes. Hilton took photographs of Victoria's breasts, vagina, and buttocks with a Polaroid camera. Hilton told her he was going to post the photographs on the Internet.

Hilton then told Victoria she still had to prostitute for him and make him some money because she did not make him ejaculate. He ordered Victoria to stop crying and gave her back her shirt and pants but refused to return the rest of her clothing. Victoria got out of the car, and Nailon followed her and told her to "shut up" and do what Hilton told her to do. Victoria ran into the lobby of the hotel where, with the assistance of the front desk clerk, she called 911.

A recording of Victoria's 911 call was played for the jurors, each of whom was given a transcript. The recording and transcript indicated Victoria was crying when she told the 911 operator that she was scared, and that a guy and two girls wanted her to prostitute herself and told her she had to "suck his dick" if she wanted to go home. She asked for help from the police. Victoria reported that she had been taken, "they were taking pictures of me too and they were saying they're gonna put them on their website and show me"; and "[h]e took off all my clothes . . . ."

On February 14, 2006, National City Police Department officers served a search warrant at Hilton's home in Chula Vista. The officers who searched Hilton's bedroom found three books in the bottom of the nightstand. One was titled *From Pimp Stick to Pulpit*; another, *Trick Baby*; and the third, *Pimp*. The book titled *From Pimp Stick to Pulpit* had a bookmark with Hilton's first name, Darren, on it. The book *Pimp* was an

autobiography by Iceberg Slim, a pimp, which included a discussion of pimping techniques. The officers also found some videotapes in Hilton's entertainment center. One, titled *American Pimp*, was a documentary on how pimps worked girls as prostitutes. Another was a Hollywood movie about Willie Dynamite, a pimp.

The officers also found in Hilton's bedroom a black and white photograph with the words "Lydia [F.], me, 11/28/03" on the back; and a bag in Hilton's nightstand that contained Polaroid photographs, including three of Victoria. The officers also searched Hilton's light-blue Cadillac and found a Polaroid camera in the trunk.

Detective Walter Escobar of the San Diego Police Department interviewed Hilton at his home in November 2005. Hilton said that Jasmine was a friend, but he never had sexual relations with her.

On February 14, 2006, National City Police Detective Gregory Seward conducted a videotaped and audiotaped interview, which was later transcribed, of Hilton at the police station. The videotape was played for the jury, and each juror received a copy of the transcript. After he was advised of his *Miranda*[2] rights, Hilton gave a statement. He told Detective Seward he worked for Ace Parking, and he had no idea why he was in custody. Hilton stated that Nailon was his girlfriend, his only sexual relationship was with her, and he had not had sex with any girls besides Nailon during the previous year and a half. He denied knowing Victoria or Marcella; denied taking photographs of, or giving rides to, females other than Nailon; denied that he was a pimp; and denied forcing

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2 *Miranda v. Arizona* (1966) 384 U.S. 436.

any girl to engage in sex acts. Eventually, Hilton said he did have oral sex with Victoria, but it was consensual.

Toward the end of the interview, Hilton stood up and tried to leave, and Detective Seward stepped in Hilton's path because Hilton was under arrest and was not free to leave. The transcript indicates Detective Seward instructed Hilton to face the wall and put his hands behind his back, Hilton screamed and shouted obscenities at the detective, accused him of hurting him, and called him a "dirty cop."

B. *The Defense*

Joshua Johnson, an information technology engineer for the district attorney's office, examined Hilton's personal computer for evidence of pimping and child pornography, but found none. On cross-examination, he testified that he found digital image files of nude and clothed young women in sexually suggestive poses.

In January 2006 National City Police Officer Omar Ramirez interviewed Victoria, who said she willingly performed oral sex on Hilton and voluntarily removed her clothes so he could take photographs of her. Victoria, who looked like she had been crying, also told the officer she was scared, wanted to go home, and although she was not forced to perform those acts, she performed them because she was scared and wanted to go home.

DISCUSSION

I. *DENIAL OF HILL'S WHEELER/BATSON MOTION*

Hilton first contends the court erred in denying his *Wheeler/Batson* motions that challenged the prosecutor's use of peremptory challenges to dismiss prospective male jurors Nos. 1, 14, 23 and 36. We reject this contention.

A. *Background*

1. *Denial of Hilton's Wheeler/Batson motion during jury selection*

The prosecutor exercised his first peremptory challenge against prospective juror No. 1, his second peremptory challenge against prospective juror No. 14, his third against prospective juror No. 23, and his fourth against prospective juror No. 36. When the prosecutor excused prospective juror No. 36, defense counsel requested a sidebar conference and objected to those peremptory challenges, claiming the prosecutor's exclusion of four male prospective jurors indicated a pattern of exclusion based on gender.

Following a recess, the court, indicating that men were a protected class and a prima facie showing of discrimination had been made, asked the prosecutor for an explanation for his exclusion of the four male prospective jurors. The prosecutor, indicating the prospective jurors were Caucasian males, stated he was unaware that men were a protected class. The court stated it believed Caucasian males were a protected class.

The prosecutor then explained that he dismissed *prospective juror No. 1* because he appeared to be a loner who had no children and no significant others, appeared apprehensive and withdrawn, and appeared to be someone who did not interact well in a group. The prosecutor said he was looking for jurors who would interact and communicate with others in a group. The prosecutor believed prospective juror No. 1 was not that type of individual.

With respect to *prospective juror No. 14*, the prosecutor indicated he had deleted the information about this prospective juror from his electronic juror list and asked someone to refresh his memory about the individual's background information. Defense counsel indicated the prospective juror was a mechanic in the Navy, his wife was a high school attendance clerk, he had two adult children, and he had served as a juror in a personal injury case. The prosecutor explained that he dismissed prospective juror No. 14 because he did not want a juror whose previous experience was such that he might reach a decision by a preponderance of the evidence and because he wanted a juror who would listen with an open mind without the concept of preponderance of the evidence "in his head as opposed to the reasonable doubt standard the court [was] going to instruct on."

With respect to *prospective juror No. 23*, an unemployed former telecommunications company employee who had also worked in security, the prosecutor indicated he dismissed that prospective juror because he was chewing gum and "had an attitude" that was not conducive to working in a group environment.

With respect to *prospective juror No. 36*, a bilingual teacher who had worked as a writer, the prosecutor incorrectly stated the prospective juror was a philosophy major who had "worked for The Tribune." Neither defense counsel nor the court corrected this mistake, and the record shows another prospective juror (No. 40) had stated he was "interning at The Union Tribune" and was taking philosophy courses. The prosecutor explained he had had difficulties in the past with jurors like prospective juror No. 36 who had "that type of background." The prosecutor stated, "[A]nytime the word philosophy

comes up, it sends a radar." He indicated he dismissed prospective juror No. 36 because, in his experience, jurors with a philosophy background went off on tangents during deliberations, rather than applying the law to the facts.

Defense counsel urged the court to find the challenges violated case law because, while the prosecutor's explanations might be true, "the court could reasonably conclude that there's more to it than that" because all of the victims were women. The prosecutor replied that his reasons for dismissing the prospective jurors were all "tied to the individual juror and [were] valid reasons for excusing them."

The court denied Hilton's *Wheeler/Batson* motion, finding there was no indication the prosecutor excluded the four prospective jurors solely because they were males, and there were 'justifiable reasons" for their exclusion. The court indicated that a number of other males were excluded for cause because they stated they could not be fair or impartial, and it did not appear the prosecutor was attempting to get an all-female jury. The court added it was denying the motion without prejudice, and defense counsel could bring the motion again if he felt he had a "renewed basis" for doing so.

2. *Denial of Hilton's new trial motion*

Hilton did not renew his *Wheeler/Batson* motion during the trial. However, after the jury returned its verdicts, Hilton brought a new trial motion based in part on the court's denial of his *Wheeler/Batson* motion during voir dire. Hilton asserted that "[d]uring jury selection, the defense made a prima facie case that the prosecutor had systematically excluded male jurors, as evidenced by consecutive peremptory challenges of four males." Acknowledging he had been tried before a jury of three males and nine

females, Hilton also stated that "[t]he justifications provided by the prosecutor for [the] challenges were woefully insufficient and could have likely been applied to any number of unchallenged, female panelists."

In denying the new trial motion, the court found the prosecutor had given a "very valid reason" for each of the prosecutor's peremptory challenges against prospective jurors Nos. 1, 14, 23 and 36, and stated the prosecutor's "nonbiased" reasons "did not discriminate at all against the White males."

B. *Applicable Legal Principles: Wheeler/Batson Inquiry*

Both the federal and state Constitutions prohibit the use of peremptory challenges to exclude prospective jurors based upon bias against members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds. (*Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; accord, *People v. Salcido* (2008) 44 Cal.4th 93, 135-136 (*Salcido*); see also *Batson*, *supra*, 476 U. S. at pp. 88-89; *People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).) "Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution." (*Lenix*, *supra*, 44 Cal.4th at p. 612.)

This prohibition applies to the exclusion of prospective male jurors on the basis of group bias. (*People v. Williams* (2000) 78 Cal.App.4th 1118, 1125; *People v. Cervantes* (1991) 233 Cal.App.3d 323, 332.)

A rebuttable presumption exists that a "peremptory challenge is properly exercised, and the burden is upon the opposing party to demonstrate impermissible discrimination against a cognizable group." (*Salcido*, *supra*, 44 Cal.4th at p. 136.)

The three-step *Wheeler/Batson* inquiry, which applies equally to *Wheeler/Batson* claims made under the federal and state Constitutions (*Lenix*, *supra*, 44 Cal.4th at p. 613), is well-established. First, the trial court must determine whether the objecting defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge to excuse a prospective juror for a discriminatory purpose. (*Johnson v. California* (2005) 545 U.S. 162, 168 (*Johnson*); *Salcido*, *supra*, 44 Cal.4th at p. 136; see also *Lenix*, *supra*, 44 Cal.4th at p. 612.) "[T]he prima facie burden is simply to 'produc[e] evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.'" (*People v. Hawthorne* (2009) 46 Cal.4th 67, 79, quoting *Johnson*, *supra*, 545 U.S. at p. 170.)

Second, if the defendant has made the requisite prima facie showing, the burden shifts to the prosecutor to explain adequately the exclusion by offering a permissible group-neutral justification. (*Johnson*, *supra*, 545 U.S. at p. 168; *People v. Arias* (1996) 13 Cal.4th 92, 135; see also *Salcido*, *supra*, 44 Cal.4th at p. 136; *Lenix*, *supra*, 44 Cal.4th at p. 612.) The proper focus of a *Wheeler/Batson* inquiry is on the *subjective* genuineness of the group-neutral reasons given by the prosecutor for the peremptory challenge, *not* on the objective reasonableness of those reasons. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924 ["[I]f a prosecutor believes a prospective juror with long, unkempt hair, a mustache, and a beard would not make a good juror in the case, a peremptory challenge to the

prospective juror, sincerely exercised on that basis, will constitute a valid and nondiscriminatory reason for exercising the challenge."].) "All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory." (*Ibid*.) The prosecutor's explanation need not rise to a level that justifies the exercise of a challenge for cause. (*Lenix*, *supra*, 44 Cal.4th at p. 613.) "[A]dequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias and not simply as 'a mask for . . . prejudice' [citation]." (*People v. Williams* (1997) 16 Cal.4th 635, 664.)

Third, if the prosecutor has met his or her burden of tendering a group-neutral explanation for the peremptory challenge, the trial court must determine whether the defendant has proven purposeful discrimination. (*Salcido*, *supra*, 44 Cal.4th at p. 136, citing *Johnson*, *supra*, 545 U.S. at p. 168; see also *Lenix*, *supra*, 44 Cal.4th at p. 612.) The ultimate burden of persuasion rests with the party opposing the use of a peremptory challenge. (*Lenix*, *supra*, 44 Cal.4th at pp. 612-613.) At this third stage of the *Wheeler/Batson* inquiry, the issue is whether the trial court finds the prosecutor's group-neutral explanations to be credible. (*Id*. at p. 613.) "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Ibid*.)

"Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions." (*Lenix*, *supra*, 44

Cal.4th at p. 613.) We review with great restraint a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges, and we presume that a prosecutor uses his or her peremptory challenges in a constitutional manner. (*Id*. at pp. 613-614.) So long as the trial court makes a sincere and reasoned effort in evaluating the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. (*Id*. at p. 614.)

C. *Analysis*

Acknowledging that the prosecutor gave gender-neutral reasons for his exclusion of male prospective jurors Nos. 1, 14, 23 and 36, Hilton claims those reasons were "merely pretexts designed to disguise gender discrimination," and the court's "conclusion to the contrary was not reasonable or supported by substantial evidence." After reviewing the record of the voir dire and applying the deferential substantial evidence standard of review, we reject Hilton's claims and conclude substantial evidence supports the court's findings and its denial of Hilton's *Wheeler/Batson* motions.

1. *Prospective juror No. 1*

As already discussed, a prosecutor's mere "hunch" about a prospective juror may adequately justify the exercise of a peremptory challenge against that prospective juror so long as the challenge was exercised for reasons other than impermissible group bias. (*People v. Williams*, supra, 16 Cal.4th at p. 664.)

Here, substantial evidence shows the prosecutor's exclusion of prospective juror No. 1 was based on a permissible group-neutral "hunch." During voir dire, prospective juror No. 1 stated he had no children, he had no spouse or any significant personal

relationship, he was retired, and he spent most of his working career in the travel and electronics industries. The prosecutor later explained to the court that he dismissed prospective juror No. 1 because he appeared to be a loner who had no children and no significant others, appeared apprehensive and withdrawn, and appeared to be someone who did not interact well in a group. The prosecutor also explained that he was looking for jurors who would interact and communicate with others in a group, and he believed prospective juror No. 1 was not that type of individual. The record thus amply supports the prosecutor's gender-neutral reasons, which can properly be characterized as a permissible "hunch," for excusing prospective juror No. 1. (See *People v. Williams*, supra, 16 Cal.4th at p. 664.)

2. *Prospective juror No. 14*

Substantial evidence also supports the court's determination that the prosecutor properly excluded prospective juror No. 14. During voir dire, the court asked the prospective jurors for a show of hands of those who had previously served on a jury, and then asked who had previously served on a civil case. Prospective juror No. 14 raised his hand and indicated to the court he had served as a juror on a civil case in which the plaintiff was "suing a check cashing place for improper security." Prospective juror No. 14 later indicated that he had two adult children, he did not know the name of the company where his son worked as a clerk, and he was not sure what kind of work his daughter did, but it was "[s]omething to do with whatever, you know, engineering, whatever."

As already noted, the prosecutor explained to the court that he dismissed prospective juror No. 14 because he did not want a juror whose previous experience was such that he might reach a decision by the lower preponderance-of-the-evidence standard of proof. This reason is gender-neutral. Although Hilton maintains "[i]t is simply not believable that the prosecutor was concerned about that," the People point out, and Hilton does not dispute, that the only other prospective juror who had civil jury experience (prospective juror No. 1) was also dismissed by the prosecutor. Reviewing with great restraint the court's determination regarding the sufficiency of the prosecutor's justification for excluding prospective juror No. 14, as we must (*Lenix*, *supra*, 44 Cal.4th at pp. 613-614), we conclude the court did not err as the record supports the prosecutor's gender-neutral justification.

3. *Prospective juror No. 23*

We next conclude that substantial evidence supports the court's determination that the prosecutor properly excluded prospective juror No. 23, an unemployed former telecommunications company employee who had also worked in security. As already noted, the prosecutor explained that he exercised the peremptory challenge because prospective juror No. 23 was chewing gum during voir dire and "had an attitude" that the prosecutor believed was not conducive to working in a group environment. Hilton does not dispute that prospective juror No. 23 was chewing gum during voir dire.

In *People v. Jordan* (2006) 146 Cal.App.4th 232, a case in which the prosecutor dismissed a prospective juror in part because she chewed gum during voir dire and the prosecutor believed her gum chewing showed a lack of respect for the court (*id.* at p.

254), the Court of Appeal upheld the trial court's denial of the defendant's *Wheeler/Batson* motion as to that prospective juror, stating, "the fact that defense counsel did not think that gum chewing was disrespectful does not call into question the credibility of the prosecutor's reasons for excusing" that prospective juror. (*Id.* at p. 255.)

Jordan is on point and holds that a prospective juror's act of chewing gum during voir dire is a proper and sufficient ground for exclusion of that prospective juror through the exercise of a peremptory challenge. (*People v. Jordan*, *supra*, 146 Cal.App.4th at pp. 254-256.) We reject Hilton's claim that *Jordan* is distinguishable because, here, the prosecutor did not say the gum chewing was disrespectful. The record here, however, shows that although the prosecutor did not expressly state that prospective juror No. 23's gum chewing was disrespectful, he did cite the gum chewing as a gender-neutral reason for the exclusion and indicated that prospective juror No. 23 had a bad attitude. We conclude substantial evidence supports the court's finding on the credibility of the prosecutor's explanations.

4. *Prospective juror No. 36*

We also uphold the prosecutor's dismissal of prospective juror No. 36 based on the prosecutor's concerns about that he was a philosophy major. Hilton's contention that there was no evidence that prospective juror No. 36 was a philosophy major, and thus "the prosecutor's rationale was not supported by substantial evidence," is unavailing. In *People v. Williams* (1997) 16 Cal.4th 153, 189, the California Supreme Court explained that a genuine "mistake" engendered by faulty memory, clerical errors, and similar conditions is "not necessarily associated with impermissible reliance on presumed group

bias." Here, substantial evidence supports a finding that the prosecutor's exclusion of prospective juror No. 36 was based on a genuine but mistaken belief that prospective juror No. 36 was a philosophy major. The reporter's transcript of the voir dire proceeding shows that almost immediately after prospective juror No. 36 stated he was a bilingual teacher and a writer, prospective juror No. 40 stated he was a fulltime student taking philosophy courses. The record supports a reasonable inference that the prosecutor genuinely but mistakenly believed that prospective juror No. 36 was the fulltime student taking philosophy courses.

Finally, the record shows the jury that convicted Hilton included three men, as Hilton acknowledged in his new trial motion and as his counsel pointed out during the hearing on that motion. The prosecutor's acceptance of three male jurors is an additional indication that he acted in good faith for a nondiscriminatory purpose when he exercised the peremptory challenges against prospective jurors Nos. 1, 14, 23 and 36. (See *People v. Stanley* (2006) 39 Cal.4th 913, 938, fn. 7 ["'While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection"'], quoting *People v. Turner* (1994) 8 Cal.4th 137, 168.) For the foregoing reasons, we affirm the court's denial of Hilton's *Wheeler/Batson* motions.

II. *CLAIM OF PROSECUTORIAL MISCONDUCT*

Hilton also contends the prosecutor committed misconduct and violated Hilton's federal constitutional right to a fair trial by asserting during closing arguments that "the Lord worked for" Marcella, one of the alleged victims. We reject this contention.

A. *Background*

During closing argument, as he was discussing the crimes Hilton allegedly committed against Marcella, the prosecutor recounted Marcella's testimony that she had gone to the bathroom in the Mexican restaurant and telephoned her mother. The prosecutor then said to the jury:

> "So what does Marcella do then? Sometimes this may be an overworked word, but I don't think it is here ladies and gentlemen, *the Lord works in mysterious ways, and that day the Lord worked for Marcella*, that day in mid-July 2004 when she comes out of that bathroom --" (Italics added.)

Defense counsel interrupted the prosecutor's closing argument and asked for a sidebar conference. Outside the presence of the jury, defense counsel objected that the prosecutor's reference to the "Lord working in mysterious ways" was an inappropriate attempt to bring religion into the case and incur the favoritism of Christian members of the jury. Defense counsel then asked for a mistrial or, in the alternative, an admonition that the prosecutor not make any reference to "religious morals, concepts, slogans, phrases from the Bible, or anything else." Defense counsel also asked the court to tell the jury they should reject any appeals to religious values or concepts in making their decision and focus on the instructions.

The prosecutor defended his argument, stating:

> "This is argument, and argument allows parables of good behavior, parables of good moral standards, and the Bible is full of stories like the Good Samaritan, and that's what we have here."

The prosecutor also objected to the requested jury admonition, stating:

> "Our whole way of life is based on religious precepts of thou shalt not do this, thou shalt not kill, thou shalt not covet they neighbor's wife, thou shalt not steal. All the moral basis of why we're here stems from who we are as a society, and to instruct the jury they're to throw out all their moral teachings when the law is based on that morality is just turning common sense on its head."

Indicating that case law permitted the prosecution to quote parts of the Bible and make references to biblical phrases to emphasize a point and finding the prosecutor's reference did not cause irreparable injury to Hilton's defense, the court denied his requests for a mistrial and an admonition to the jury. The court added it did not believe the prosecutor was going to "turn this into a Sunday sermon," and his reference to the "Lord working in mysterious ways" was "within the bounds of reasonable argument" and did not appeal to "passion or prejudice or anything outside of the evidence."

The court informed counsel it was going to remind the jurors that the arguments of counsel were not evidence. After the sidebar conference ended, the court told the jury:

> "Ladies and gentlemen, we're back on the record again. I just want to remind you that the arguments of counsel are not evidence and I've instructed you on that before, and I think you understand what the instructions states. [¶] So we'll allow the prosecutor to continue."

B. *Applicable Legal Principles*

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Harrison* (2005) 35 Cal.4th 208, 242.) A prosecutor's conduct that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under California law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. (*People v. Hinton* (2006) 37 Cal.4th 839, 862-863.)

When a claim of prosecutorial misconduct "focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Ayala* (2000) 23 Cal.4th 225, 284.)

"[A]n appeal to religious authority . . . is improper because it tends to diminish the jury's personal sense of responsibility for the verdict" and carries the potential the jury will ignore the trial court's instructions. (*People v. Hill* (1998) 17 Cal.4th 800, 836-837.) A motion for mistrial should be granted only when a party's chances of receiving a fair trial have been irreparably damaged. (*People v. Ayala, supra,* 23 Cal.4th at p. 282.) We review a trial court's ruling on a motion for mistrial based on prosecutorial misconduct for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.)

C. *Analysis*

We conclude that although the prosecutor's religious references were improper, they did not rise to the level of prosecutorial misconduct. His arguments that "the Lord

works in mysterious ways" and "that day the Lord worked for Marcella" were improper because they suggested to the jury that a divine intervention had assisted Marcella, and thereby created an unnecessary risk that the jurors might abandon logic and reason and convict Hilton "for reasons having no place in our judicial system." (*People v. Roldan* (2005) 35 Cal.4th 646, 743, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) However, unlike the prosecutor in *People v. Hill*, *supra*, 17 Cal.4th at page 836, who tried to explain why the biblical maxim "Vengeance is mine sayeth the Lord" should not dissuade the jury from imposing the death penalty in that case, the prosecutor here did not ask the jury to consider biblical teachings when deliberating.

Even if we were to conclude the prosecutor committed misconduct by making those religious references, we would also conclude such misconduct did not violate Hilton's federal constitutional right to a fair trial and does not require reversal of the judgment. Before the prosecutor gave his opening statement, the court instructed the jury under CALCRIM No. 222 in part that they must decide the facts in the case using only the evidence presented in the courtroom, and the attorneys' arguments were not evidence:

> "You must decide what the facts are in this case. You must use only the evidence that is presented in this courtroom. . . . [¶] Nothing that the attorneys say is evidence. In their opening statements and *closing arguments*, the attorneys will discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. . . ." (Italics added.)

The next day, again before the prosecutor gave his opening statement, the court reminded the jury that the attorneys' closing arguments were not evidence:

> "The district attorney is going to give an opening statement. As I told you earlier in the proceedings yesterday, . . . the statements of the attorneys at any time, opening statements, *closing arguments*, questions, [are] not evidence, and you can only receive evidence from individuals who have been placed under oath and have testified from the stand up here or other items that I describe and tell you are evidence" (Italics added.)

Later, before the prosecutor gave his closing argument, the court again instructed the jury under CALCRIM No. 222 that the attorneys' arguments were not evidence and the jurors must decide the facts using only the evidence presented in the courtroom. Then, as already noted, after the sidebar conference that followed the prosecutor's improper religious reference during his closing argument, the court again reminded the jury that the prosecutor's argument was not evidence. We presume the jurors followed these instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Hilton has made no showing that would rebut this presumption.

Furthermore, the prosecutor's challenged remarks consisted of one sentence in a lengthy closing argument, the transcription of which consists of about 60 pages in the reporter's transcript. Although it is not necessary here to revisit the incriminating evidence upon which the jury's verdicts rest in this matter, we observe the evidence supporting the convictions is overwhelming.

In light of the comparative insignificance of the prosecutor's improper religious references and the court's repeated admonitions to the jury that it not treat the prosecutor's arguments as evidence, we conclude the prosecutor's misconduct did not irreparably damage Hilton's chances of receiving a fair trial, it did not violate his federal constitutional right to a fair trial, it did not involve the use of deceptive or reprehensible

methods, and Hilton has failed to demonstrate a reasonable likelihood the jury construed the remarks in an objectionable fashion. The misconduct was harmless under any standard of prejudice. Accordingly, we affirm the judgment.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.